

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: MR. AND MRS. GREGORY SWECKER, Complainants, vs. MIDLAND POWER COOPERATIVE, Respondent.	DOCKET NO. FCU-99-3 (C-99-76)
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ORDER REGARDING RESPONSES

(Issued September 28, 1999)

On August 23, 1999, Mr. Greg Swecker filed a "Motion to Determine Rates and To Provide Backup Power to QF Facility." On September 1, 1999, Midland Power Cooperative (Midland) filed a resistance to the motion. On September 7, 1999, Central Iowa Power Cooperative (CIPCO) and the Iowa Association of Electric Cooperatives (IAEC) (collectively, the intervenors) filed a response and request for dismissal of the motion.

An Order was issued denying the motion on September 9, 1999.

On September 9, 1999, Mr. Swecker filed a response to the intervenors' request for dismissal. On September 10, 1999, the Office of Consumer Advocate (OCA) filed a response to complainants' motion to determine rates and to provide backup power to QF facility.

The OCA and Swecker responses appear to be unnecessary or untimely. There is no provision in the rules for the party who originally filed a motion to file a response to a resistance or response to the motion. Thus, Mr. Swecker's response is not contemplated by Utilities Board (Board) rules. Responses to motions may be filed by any party no later than 14 days from the date the motion is filed, unless otherwise ordered by the Board or administrative law judge. 199 Iowa Admin. Code 7.7(11). Fourteen days from August 23, 1999 was September 7, 1999 (September 6, 1999 was Labor Day). Thus, the OCA's response appears to be untimely, although the OCA characterizes Mr. Swecker's motion as an application for rates, which would give the OCA twenty days to file a response. 199 Iowa Admin. Code 7.5(1). While these responses may not be contemplated by Board rules, or may not be timely, it will advance the resolution of the issues in this case if the arguments presented in the responses are addressed at this time.

In his response, Mr. Swecker reiterates the position he took in his motion that Iowa Code § 476.41 applies to Midland. He also cites Iowa Code § 476.1A as authority that Midland may not make or grant any unreasonable preferences or advantages as to rates and services to any person, and may not subject any person to any unreasonable prejudice or disadvantage, and requests that rates be set and backup power be provided pursuant to Iowa Code § 476.1A. Mr. Swecker also states that "if Midland tries to now maneuver under the guise of non-jurisdictional issues, then sanctions should be imposed for perjury, fraud in the inducement, and

concealment of fact to its members and the Board and obstruction of justice to the complainants.”

Mr. Swecker is correct that Iowa Code § 476.1A (1999) applies to Midland. § 476.1A provides that electric cooperatives like Midland may not make or grant any unreasonable preferences or advantages as to rates and services to any person, and may not subject any person to any unreasonable prejudice or disadvantage. The Board and the undersigned have the authority to review whether Midland has violated § 476.1A. The code section does not provide authority to allow the Board or the undersigned to set rates for Midland. Iowa Code § 476.1A (1999). It is similar to Iowa Code § 476.21, which allows the Board to review Midland's rates and services to determine whether those rates and services are discriminatory as to the Sweckers (and as to Mr. Welch, since his intervention), or whether Midland discontinued services or subjected the complainants to any unreasonable prejudice or disadvantage based on the complainants' use of renewable energy sources.

In its response, the OCA argues that the requirements of Iowa Code §§ 476.41-.44 apply to Midland. The OCA states that Midland's, CIPCO's, and the IAEC's reliance on Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987) is misplaced, and that the case does not hold that Iowa Code §§ 476.41-.44 are preempted by PURPA. The OCA also cites § 476.1A as authority that §§ 476.41-.44 apply to Midland. The OCA cites to numerous instances in the Iowa Code which show the legislature's intent to subject non-rate-regulated

utilities to §§ 476.41-.44. The OCA also points out that Midland stated in its resistance to Mr. Swecker's August 23, 1999 motion that §§ 476.41-.44 imposed some requirements on Midland.

In order to understand what the Iowa Supreme Court meant in the Iowa Power decision, it is helpful to review the underlying Polk County District Court decision by Judge Critelli. Judge Critelli issued his decision on March 26, 1986, in Polk County Nos. AA677 and AA790. It is also helpful to review the applicable 1985 and 1987 Iowa Code sections. The 1985 Code was in effect when Judge Critelli issued his decision. In the Iowa Power decision, the Supreme Court stated all references in the decision were to the 1987 Code. (f/n 3, p. 238.)

In his decision, Judge Critelli stated that the legislature and the Commerce Commission (the predecessor agency to the Utilities Board) properly had service regulatory authority over non-rate-regulated utilities, but that "authority to regulate rates for electricity (including those fixed in regards to alternate energy production programs) has been preempted by federal authority and is not available to the Iowa legislature or the Commerce Commission." Iowa Power and Light Co. et al. v. Iowa State Commerce Comm'n, AA677 & AA790, Polk Cty. Dist. Ct. (1986); p. 74. Judge Critelli held that Senate File 380 as contained in Iowa Code Chapter 476 and the Commerce Commission rules promulgated thereunder were "unconstitutional and invalid to the extent that there is an attempt to apply and enforce such rules to non-rate-regulated utilities". *Id.* at p. 72. He further held that Senate File 380 (codified at

§§ 476.41-.45) and the Commerce Commission rules promulgated thereunder were unconstitutional to the extent they attempted to establish rate regulation to otherwise non-rate-regulated utilities. *Id.* at p. 74.

Senate File 380 was passed by the Iowa legislature in 1983. It contained the Iowa Code sections codified at 476.41 - .45, which were the sections considered by Judge Critelli in his decision. The 1985 Iowa Code did not contain section 476.1A.

The Iowa Supreme Court affirmed Judge Critelli's decision. Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987). The Court stated the following:

The parties raise a number of arguments concerning federal preemption. The scheme envisioned in Iowa Code sections 476.41-.45 and in the challenged regulations was intended to apply both to rate-regulated and non-rate-regulated utilities. The district court held the federal government and the federal energy regulation [sic] commission (FERC) have preempted a part of the intended field; it held that purchases by non-rate-regulated utilities from AEP's were subject to federal regulation and hence not subject to Iowa regulation. The commission separately assigns this holding as error.

...

The district court however correctly observed a congressional intent to distinguish, in regulating cogeneration and small power facilities, between state regulated electric utilities and nonregulated electric utilities.

...

We think Congress intended to preempt only that part of the field which was not already state-regulated.

Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236, 241 (Iowa 1987).

At the time the Supreme Court affirmed Judge Critelli's decision, Iowa Code §§ 476.41-.45 (1987) were essentially the same as they were in the 1985 Code.¹ Although Iowa Code §§ 476.41-.45 (1999) contain many changes from the 1987 Code, none are significant to the analysis in this case. However, unlike the 1985 Code, the 1987 Iowa Code also contained § 476.1A, which stated the Board had no rate regulation authority over rural electric cooperatives. That section further stated: "However, sections 476.20, 476.21, 476.41 through 476.44, 476.51 and 476.61 and chapters 476A and 478, to the extent applicable, apply to such electric utilities." With the addition/change of three code sections, this language is still contained in Iowa Code § 476.1A (1999).

There is language in Judge Critelli's decision which supports the OCA's argument that only the rate-regulation portions of Iowa Code §§ 476.41-.45 are preempted by PURPA. Judge Critelli's final holding at page 74 is that "Senate File 380 and the Commerce Commission rules are unconstitutional to the extent that they attempt to establish rate regulation as regards otherwise unrate-regulated utilities." However, when discussing Judge Critelli's decision, the Supreme Court did not cite to this holding, but referred to a much broader statement by Judge Critelli: that purchases by non-rate-regulated utilities from AEPs were subject to federal regulation and hence not subject to Iowa regulation. Although the Supreme Court characterizes this latter statement as the holding by Judge Critelli, a fair reading of

¹ The only change was the reference to the Board: in the 1985 Code, the Board was referred to as "the commission", the predecessor name of the Board.

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within reason, including motions to dismiss. 199 Iowa Admin. Code §7.7(11). There is no justification for imposing sanctions as proposed by Mr. Swecker.

IT IS THEREFORE ORDERED:

1. The portion of Mr. Swecker's response which argues that Iowa Code § 476.1A provides that Midland may not make or grant any unreasonable preferences or advantages as to rates and services to any person, and may not subject any person to any unreasonable prejudice or disadvantage, is hereby approved. However, Iowa Code § 476.1A does not provide the Board or the undersigned with authority to set rates for Midland.

2. In all other respects, the OCA's and Mr. Swecker's responses are hereby denied.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Raymond K. Vawter, Jr.
Executive Secretary

Dated at Des Moines, Iowa this 28th day of September, 1999.